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No. 831

In the Supreme Court of the United States

OCTOBER TERM, 1960

F. M. REEVES AND SONS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The grounds for the order of the court of appeals adjudging petitioner in civil contempt are stated therein (Pet. 21-22.) The court's original opinion enforcing the Board's order (Pet. 28-36) is reported at 273 F. 2d 710. The Board's decision and order (Pet. 23-27) are reported at 121 NLRB 1280.

JURISDICTION

The order of the court of appeals adjudging petitioner in civil contempt was entered on January 19, 1961 (Pet. 21-22). The petition for a writ of certiorari was filed on March 20, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly found that petitioner had contumaciously disobeyed the court's

order to bargain collectively with the union as the exclusive representative of its employees, by granting unilateral wage increases to the employees and by insisting on a performance bond from the union as a condition of entering into a collective bargaining agreement.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are set forth below:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment authorized in section 8(a)(3).
>
> Sec. 8(a) It shall be an unfair labor practice for an employer
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> . . . . . .
>
> (5) to refuse to bargain collectively with the representatives of his employees. . . .
>
> . . . . . .

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession; * * *

* * * * *

STATEMENT

On October 13, 1958, the Board, in an unfair labor practice proceeding under Section 10 of the Act, issued its Decision and Order against petitioner. The Board found that petitioner, in violation of Section 8(a) (5) and (1) of the Act, had refused to recognize or bargain with the Union[1] which petitioner's employees had designated as their exclusive bargaining representative, and in disregard of the Union's representative status had unilaterally granted a wage increase and other benefits to the employees (Pet. 25). *F. M. Reeves and Sons, Inc.*, 121 NLRB 1280. The Board's order, in relevant part, directed petitioner to cease and desist from refusing to bargain with the Union as the representative of the employees, and from offering wage increases and other employment benefits to the em-

[1] Local 492, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

ployees "in derogation of the Union's status as bargaining representative and in an attempt to win employee allegiance from the Union * * *" (Pet. 25). On December 17, 1959, the court below upheld the Board's findings and on January 18, 1960, entered a decree enforcing the Board's order in full (Pet. 28-38). 272 F. 2d 710.

On November 3, 1960, the Board filed a petition in the court below to have petitioner adjudged in civil contempt for disobedience of the court's decree (*infra*, p. 12).[2] Petitioner filed an answer denying that it had violated the decree (*infra*, p. 20). Thereafter the Board requested the court below for leave to amend its petition by adding a further allegation with respect to petitioner's disobedience of the decree (*infra*, p. 31). Petitioner filed a further answer objecting to the Board's motion to amend its petition (*infra*, p. 32). The court granted leave to amend the petition and entertained the petition as amended (Tr. of Proceedings, p. 8).

In substance, the facts as set forth in the petition as amended, petitioner's answers thereto, and the statements of counsel made in open court are as follows:

Following entry of the decree, petitioner and the Union opened contract negotiations (Pet. 5). By August 1960 both parties had submitted contract proposals and some agreement had been reached, but a number of issues, including wages, were still unresolved (Br.

[2] The relevant papers are set forth in the Appendix, pp. 12-30 *infra*. We have also lodged with the Clerk of the Court a transcript of the proceedings in the court below on the contempt petition, January 19, 1961.

Pet. Contempt Adj., par. III 2; Pet.'s Answer, par. I). On August 2, the Union telegraphed petitioner, requesting a meeting on August 10-12 in Roswell, New Mexico, where petitioner's plant is located. Counsel for petitioner replied by letter the same day, excusing himself from meetings on the proposed dates because of prior commitments, and referring to his understanding that the Union was to submit counter proposals if it was unwilling to accept certain terms proposed and discussed at the last negotiation meeting. The letter concluded (*infra*, pp. 17-18):

> In regard to wages, it is my recollection that you were going to contact the Albuquerque Sand and Gravel Company and ascertain what wages were being paid by that company, and that the rates being paid by that company might have a bearing on the rates that could be paid by our client. We have again discussed with management the matter of wages, and it would be willing to institute a wage increase at this time to the following rates:
>
> [Wages scale specified]
>
> We would appreciate it very much if you would let us have the wages being paid by Albuquerque Sand and Gravel Company if this information is available to you. We would also like to have any counter proposals you or the employees would care to make, so we can study them before we come to Roswell.

Upon receiving this letter, the Union telegraphed petitioner requesting meetings on August 15-17. Peti-

tioner answered on August 5, agreeing to meet with the Union at Roswell on August 16 (Bd.'s Pet. Contempt Adj., par. III 3; Pet.'s Answer, pars. V, IX, pp. 2, 7). On August 9, petitioner, without notice to the Union, instituted certain wage increases, retroactive to August 1 and differing from the wage scale proposed as a basis for negotiation in petitioner's letter of August 2 (Pet.'s Answer, par. IX, pp. 6-7).

The negotiating meeting was held as scheduled on August 16. At that time, petitioner notified the Union of the wage increases which had already gone into effect (Pet. 15). On September 10, 1960, the Union filed charges with the Board alleging that petitioner's unilateral action violated the Act (Pet. Ans. par. IX, p. 7).

On December 7, petitioner reiterated the demand made in its first contract proposal over six months earlier that the Union execute a $25,000 contract performance bond. Article 8 of petitioner's last contract proposal in December provided, in terms identical to article 8 of its first proposal in April:

> The Union shall execute and deliver to the Company a performance bond with a recognized surety company, authorized to do business in the State of New Mexico, in the principal amount of twenty-five thousand dollars ($25,000.00), and which bond shall be payable to the Company and conditioned that the Union shall perform all of the duties and obligations provided for in this Agreement.

Moreover, during the course of the proceedings in the court below, petitioner asserted that, while it was

not demanding any particular form of performance bond, it would nevertheless "insist" on "some form of security" from the Union as a condition of entering into a collective bargaining agreement." (Tr. of Proceedings 66-67; 17, 60, 65-66, 69-70).[3]

On these facts the court below adjudged petitioner to be in contempt of court, finding "that the granting of the unilateral wage increase without the consent of the Union constituted contempt of this court; and that the performance bond proposal submitted on two occasions, whether characterized by counsel as a request or demand, amounted to a bar to negotiating in good faith and thereby constituted contempt of this court" (Pet. 21-22). The court ordered petitioner to pay a fine of $1,000 (Pet. 22).

ARGUMENT

1. It is settled that "an employer's unilateral wage increase during the bargaining processes tends to subvert the union's position as the representative of the

[3] The following colloquy occurred between the court and counsel for petitioner (Tr. of Proceedings 66-67, 70):

Judge Beaton. . . . You say you will not require performance bond. What about other security?

Mr. Toothaker. I think we will not require some other security.

Judge Beaton. You will?

Mr. Toothaker. I think we will, yes, any one form of security, one form of reasonable security.

. . . . . .

Judge Hatch. . . . Now you have told us you may not require a bond but you will insist . . . that you have reasonable security of some kind. That is your position, or is it? I just want to be sure.

Mr. Toothaker. Yes . . . we feel that they should come to us with one form or a reasonable offer of security.

Judge Hatch. And you insist on it?

Mr. Toothaker. I think we are going to insist on it.

employees in matters of this nature, and hence has been condemned as a practice violative of the statutory provision" to bargain collectively in good faith. *National Labor Relations Board* v. *Insurance Agents' International Union*, 361 U.S. 477, 484-485; *National Labor Relations Board* v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217, 223-225; *May Department Stores Co.* v. *National Labor Relations Board*, 326 U.S. 376, 384-385. The decision below with respect to petitioner's unilateral wage increase is in accord with this controlling principle, and was amply justified by the factual showing made before the court of appeals. The petition for certiorari appears to be based principally on the contention that there was insufficient basis in fact for a finding that petitioner's action amounted to a contempt of the court. This contention, we submit, presents no grounds for review by this Court.

Petitioner seeks to excuse its unilateral wage increase on the ground that it was not granted with a view to undermining the Union's representative status but "out of business and economic necessity" and only after the Union had indicated an unwillingness "to consider a necessary general wage increase except on terms Petitioner could not accept" (Pet. 9, 10). Petitioner's asserted justification is an obvious afterthought and is belied by its letter of August 2 to the Union (*supra*, p. 5). Nothing in this letter suggests that petitioner and the Union had reached an impasse on wages in their negotiations or that business considerations required immediate action with respect to wages. On the contrary, petitioner requested the Union to submit information concerning the wages paid by a competitor

and invited it to submit "any counter proposals you or the employees would care to make so we can study them before we come to Roswell" (*supra*, p. 5). Thereafter petitioner agreed to meet with the Union on August 16. Nevertheless, seven days before the scheduled meeting, petitioner without any further notice to the Union instituted wage increases which in some respects differed from those which it had proposed in the August 2 letter. In this context the court below could well conclude, as it did, that petitioner's post-decree unilateral action was indistinguishable legally from the unilateral action which had led to the entry of the decree specifically enjoining such conduct.

Even less substantial is petitioner's further assertion that the Union must be deemed to have "ratified" petitioner's illegal conduct since it failed to protest the unilateral wage increase when it learned of it. The short answer to this contention is that the Union did not acquiesce in petitioner's action but filed charges with the Board complaining about it (Pet. 15) and it was on the basis of those charges that the Board instituted contempt proceedings.[1]

2. Petitioner also challenges the factual basis for the finding below that its insistence on a performance bond as a condition of entering into a collective bargaining agreement "amounted to a bar to negotiating in good

[1] Petitioner's suggestion that the Board itself also "ratified" its illegal conduct is frivolous. The Board normally does not require an employer to revoke wage increases made unilaterally in derogation of a union's representative status; it issues a cease and desist order to guard against a repetition of such illegal conduct. Obviously, the circumstance that in the instant case the Board consistent with its practice did not seek to require petitioner to revoke the wage increases can in no one's mind be deemed to constitute approval of petitioner's misconduct.

faith and, thereby, constituted contempt of this court." (Pet. 22a.) This contention, depending as it does on an appraisal of the particular circumstances, presents no question warranting further review. As already shown (Statement, pp. 6-7, *supra*), there is ample basis for the court's finding and conclusion. Cf. *National Labor Relations Board* v. *Borg-Warner Corp.*, 356 U.S. 342, 349.[5]

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[5] Accord: *Tower Hosiery Mills, Inc.*, 81 NLRB 658, 661 enforced, 180 F.2d 701, 704, 705 (C.A. 4); *Amory Garment Co., Inc.*, 80 NLRB 182, 193-194 enforced, 24 LRRM 2274 (C.A. 5); *Tawmina Company*, 94 NLRB 884, 885, note 3, 900-901, enforced, 207 F. 2d 251 (C.A. 5); *Standard Generator Service Company*, 90 NLRB 790, 790-791, 800, enforced, 186 F. 2d 606 (C.A. 8); *Ozark Dam Constructors et al.*, 86 NLRB 520, 521, 532, enforced, 180 F. 2d 222 (C.A. 8). Cf. *National Labor Relations Board* v. *Dalton Telephone Co.*, 187 F. 2d 841, 842 (C.A. 5), certiorari denied, 342 U.S. 824; *National Labor Relations Board* v. *I.B.S. Mfg. Co.*, 210 F.2d 634 (C.A. 5). For a critical commentary, see Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1410, note 36 (1958).

Petitioner's assertion (Pet. 14) that the decision below is in conflict with *National Labor Relations Board* v. *Tawmina*, 254 F. 2d 197 (C.A. 5), is wide of the mark. That decision antedates this Court's ruling in *Borg-Warner*, *supra*. Moreover, the employer there, unlike petitioner here, expressed a "willingness now and in the future to continue the bargaining without insisting on [the union's execution of a performance bond] . . . as a prerequisite" (244 F. 2d at 197-198), and no doubt this avowed willingness prompted the court to dismiss the contempt proceeding. The Fifth Circuit did not suggest that the employer could lawfully insist on a performance bond as a condition of arriving at a collective bargaining agreement. On the contrary, the court's original decree enforced a Board order and decision holding that the employer's insistence on a performance bond constituted a violation of the good faith bargaining obligation. 94 NLRB 884, 900-901, enforced, 207 F. 2d 251 (C.A. 5).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

STUART ROTHMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

MARION L. GRIFFIN,
Attorney,
National Labo. Relations Board.

APRIL 1961.

APPENDIX

1. Petition for Contempt

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 6125

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

F. M. REEVES AND SONS, INC., RESPONDENT

PETITION FOR ADJUDICATION IN CIVIL CONTEMPT AND FOR OTHER CIVIL RELIEF

To the Honorable, the Judges of the United States Court of Appeals for the Tenth Circuit:

The National Labor Relations Board (herein called the Board) respectfully petitions this Court to adjudge respondent F. M. Reeves and Sons, Inc., its officers and agents, in civil contempt of this Court for violating, disobeying and refusing to comply with, the decree of this Court entered herein on January 18, 1960, and for other civil relief.

In support of its petition, the Board, upon information and belief, alleges as follows:

1. On January 18, 1960, this Court entered its decree herein enforcing a Board order issued against respondent, its officers, agents, successors, and assigns.

II. In pertinent part, the order of the Board, as enforced by said decree, directs that respondent:

1. Cease and desist from:

(a) Refusing to bargain with the Union as the exclusive representative of all of its employees in the unit found to be appropriate . . . with respect to rates af pay, wages. . . .

(b) Refusing to bargain with the Union by offering wage increases and other employment benefits in derogation of the Union's status as bargaining representative and in an attempt to win employee allegiance from the Union, or using any other unlawful device to interfere with, restrain, or coerce its employees in the exercise of their right to self-organization. . . .

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with the Union as the exclusive representative of the employees in the unit found appropriate, with respect to rates of pay, wages. . . .

II. The said decree has been in full force and effect since its entry and, at all times material herein, respondent has had full knowledge of its terms.

III. Respondent has violated, disobeyed and refused to comply with, the said decree in that since entry thereof respondent has unilaterally granted wage increases to over half the employees in the bargaining unit. More particularly, the Board shows this Court as follows:

1. Following entry of the Court's decree, respondent has engaged in collective bargaining negotiations with

Chauffeurs, Teamsters and Helpers and Helpers Local No. 492, affiliate of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein called the union).

2. In the course of said negotiations, on August 2, 1960, respondent sent the union a letter concerning wage rates, one of a number of subjects on which there had not been any agreement. Said letter set forth wage rates which respondent stated it would be willing to pay, and respondent asked the union to submit counter proposals before the next bargaining session. The wage rates were stated in the form of a proposal and the union was requested to obtain comparative employee rates for another company in the same type of business (Respondent's letter of August 2, 1960 to the union is attached hereto as an exhibit).

3. Upon receipt of said letter, the union wired respondent requesting negotiating meetings on August 16, 17 and 18. Respondent replied, under date of August 5, that it would meet with the Union on August 16.

4. On August 9, respondent instituted wage increases ranging from 5 to 25 cents an hour for 22 of the 52 employees in the bargaining unit. Said increases were made retroactive to August 1. Not all of the increases were in the same amounts as those set forth in the August 2 letter, and respondent did not notify the union of the revised rates put into effect.

5. The union did not learn until August 16, at the time of the bargaining session, that respondent had instituted the wage increases on August 9.

IV. By failing to bargain collectively in good faith with the union, and by granting unilateral wage increases to its employees in the manner set forth in paragraph III and its subparagraphs, respondent has violated, disobeyed, and refused to comply with, the

decree of this Court. Thereby, respondent has been, is, and continues to be, in civil contempt of this Court.

WHEREFORE the Board respectfully prays:

1. That this Court issue an order requiring respondent to file and serve, by a day certain, a sworn answer to the allegations of this petition specifically admitting or denying, or meeting by affirmative defense, each and every allegation of the petition.

2. That this Court issue an order requiring respondent to appear before it, at a time and place to be fixed by the Court, and then and there show cause, if any there be, why respondent should not be adjudged in civil contempt for violating, disobeying, and refusing to comply with, the decree of this Court.

3. That, upon the return of the order to show cause, respondent be adjudged in civil contempt of this Court.

4. That, upon such adjudication, the Court enter an order requiring respondent to purge itself of such civil contempt by:

(a) Fully complying with and obeying paragraphs 1(a) and (b) and 2(a) of the Board's order as enforced by this Court's decree of January 18, 1960.

(b) Refraining in the future from granting unilateral wages increases to its employees in derogation of the Union's status as bargaining representative.

(c) Immediately posting in conspicuous places, including all places where notices to employees are customarily posted, for a period of at least sixty (60) consecutive days, copies of an appropriate notice, to be signed by respondent, and stating that respondent has been adjudged in civil contempt of this Court for violating, disobeying, and refusing to comply with, said decree and that respondent will take action in purgation as ordered by the Court, such notices to be maintained in clearly legible condition throughout the posting period.

(d) Filing a sworn statement with the Clerk of this Court and a copy thereof with the Director of the Sixteenth Region of the Board within fifteen (15) days after entry of the order of adjudication showing the steps taken by respondent to comply with the Court's directions, and filing further sworn statements on the first and fifteenth of each month thereafter as to the manner of respondent's bargaining with the union until the Court, by further order, determines that respondent has discharged its obligation to bargain collectively with the union.

(e) Paying to the Board all costs and expenditures, including counsel fees, incurred by the Board in the investigation, preparation, presentation and final disposition of this proceeding.

5. That, upon respondent's failure to so purge itself of contempt, this Court issue attachments against it.

6. That the Court take such other and further action and grant such other and further relief as may be just, reasonable and necessary to make effective its decree, and as this proceeding in civil contempt may require.

Dated at Washington, D. C., this 3rd day of November, 1960.

NATIONAL LABOR RELATIONS BOARD,
By MARCEL MALLET-PREVOST,
Assistant General Counsel.

STUART ROTHMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
MARCEL MALLET-PREVOST,
Assistant General Counsel,
ALLISON W. BROWN, JR.,
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EXHIBIT

EWERS, TOOTHAKER, EWERS, ELICK, JONES & ABBOTT
Attorneys at Law
1630 North Tenth Street
McAllen, Texas
P. O. Box 3667

August 2, 1960

Mr. Faro Caudill, Secretary-Treasurer,
Chauffeurs, Teamsters and Helpers Local No. 492,
216-A Iron, SW,
Albuquerque, New Mexico.

Re: F. M. Reeves and Sons, Inc., Roswell, New Mexico

DEAR MR. CAUDILL:

I acknowledge your telegram of this date requesting a meeting on the 10th, 11th and 12th of August in Roswell in regard to the above matter. I tried to reach you by phone yesterday but was advised by your office that you were out and would call me this morning. It will be impossible for me to be in Roswell on the dates you mentioned inasmuch I have a case set here before the NLRB on August 10 that will take four or five days to try. I have requested a postponement in this case but it has been denied; consequently, I will have to be here and proceed to trial.

Replying to your letter of July 21, the requests contained therein, if our notes are correct, are no different than the requests urged by you at our last meeting in Roswell on June 28. We understood that if the employees of the plant were not willing to accept the proposals we had previously discussed, they would recommend and you would submit counter proposals that the company could consider.

In regard to wages, it is my recollection that you were going to contact the Albuquerque Sand and Gravel Company and ascertain what wages were being paid by that company, and that the rates being paid by that company might have a bearing on the rates that could be paid by our client. We have again discussed with management the matter of wages, and it would be willing to institute a wage increase at this time to the following rates:

Transit Mix Drivers	$1.90 hr.
Dump truck drivers	1.85 "
Euclid drivers	1.75 "
Crusher operators	2.00 "
Caterpillar dozers	2.00 "
Crane operators	2.00 "
Loader operators	2.00 "
Mechanics	2.25 "
Welders	2.10 "
Laborers	1.40 "

We would appreciate it very much if you would let us have the wages being paid by Albuquerque Sand and Gravel Company if this information is available to you. We would also like to have any counter proposals you or the employees would care to make so we can study them before we come to Roswell.

Yours very truly,

ST:vo SCOTT TOOTHAKER.

CITY OF WASHINGTON,
District of Columbia, ss:

MARCEL MALLET-PREVOST, being duly sworn, deposes and says that he is Assistant General Counsel for the National Labor Relations Board; that he is authorized to execute and file the foregoing petition; that he has

read the petition and knows the contents thereof and that the statements therein made upon personal knowledge are true and that those made upon information and belief he believes to be true.

MARCEL MALLET-PREVOST,
Assistant General Counsel.

Sworn and subscribed to before me this 3rd day of November, 1960.

RUSSELL NEWLEN,
Notary Public,
District of Columbia.

My commission expires June 14, 1962.

2. *Answer to Contempt Petition*

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 6125

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

F. M. REEVES AND SONS, INC., RESPONDENT

RESPONDENT'S ANSWER TO PETITION FOR ADJUDICATION IN CIVIL CONTEMPT

TO THE HONORABLE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT:

The Respondent, F. M. REEVES AND SONS, INC., for answer to the petition filed against it herein, respectfully shows to the Court as follows:

I

It admits the averments of Paragraphs I and II.

II

It unqualifiedly denies the averments of the first sentence of Paragraph III, wherein it is alleged that Respondent has violated, disobeyed and refused to comply with the decree of this Court entered on January 18, 1960. Respondent likewise denies the further averment of said first sentence which charges that Respondent had unilaterally "granted wage increases to over half the employees in the bargaining unit." The gross and reckless exaggeration of this sworn statement by Petitioner is disclosed on the face of the Petition itself in Paragraph II, 4, where it is specifically averred that "Respondent instituted wage increases. . . .

for 22 of the 52 employees in the bargaining unit." The true facts showing the even smaller number of employees affected by the small raises granted in August, 1960, and the business and economic necessity for the granting thereof, are as hereinafter set out in Paragraph IX of this Answer.

III

It admits the averments of Paragraph III, 1, and shows to the Court that ever since the entry of said decree, Respondent has bargained or stood ready to bargain, in good faith with the union named.

IV

It admits addressing to said union the letter dated August 2, 1960, referred to in Paragraph III, 2, copy of which is attached as an exhibit thereto. Said letter speaks for itself with respect to its contents, rather than does Petitioner's interpretation thereof, hence Respondent relies upon the letter itself.

V

It admits the averments of Paragraph III, 3; but relies upon the written communications themselves, which are referred to, for the contents and meaning thereof.

VI

It admits, as averred in Paragraph III, 4, that on August 9, 1960, it instituted certain wage increases which were made retroactive to August 1, 1960, for the reasons and in the circumstances hereinafter fully explained. Said wage increases covered only a small portion of Respondent's employees and ranged from five cents to fifteen cents per hour. It denies that said wage increases were, or were intended to operate, in

derogation of the union's status or were made in an attempt to win employee allegiance from the union, or were intended or did operate, to interfere with, restrain or coerce respondent's employees in the exercise of their right to self-organization.

VII

It has no knowledge as to the date on which said union first learned of the wage increases referred to in Paragraph III, 5, and hence cannot admit or deny the averment of said Paragraph. Respondent can and does state, however, that in no way did it conceal or attempt to conceal the putting of such wage increases into effect, which increases were applied to only a small group of its employees, and were made out of business necessity as hereinafter set out.

VIII

It emphatically denies the averments of Paragraph IV which charge that Respondent failed to bargain collectively in good faith with said union, and that said wage increases constituted a violation or a disobeying of, or a refusal to comply with, said decree of this Court, as will be more particularly hereinafter shown. Most emphatically does Respondent deny that it at any time has been, is now, or continues to be, in civil contempt of this Honorable Court.

IX

And now further answering said petition, and in order that the Court may be fully apprised of the true facts showing the utter groundlessness of said petition, Respondent would show that:

On or about December 12, 1958, ownership, control and management of Respondent, F. M. Reeves And Sons, Inc., passed from its former owners and into the hands of its present new and entirely different

owners, who then assumed full control of Respondent and of the operation of its said Roswell plant. At that time and for approximately a year and a half thereafter, only 39 employees were engaged in working for Respondent at said plant, of whom 19 were transit mix truck drivers. At no time from and after date of December 12, 1958, has Respondent had lodged against it any charge of any unfair labor practice of any kind until the charge filed on September 10, 1960, which led to this proceeding. At all times Respondent's relationships with its employees have been harmonious and amicable.

On October 12, 1958, the National Labor Relations Board had rendered its decision and order affirming the Intermediate Report filed by the Trial Examiner on February 28, 1958, wherein Respondent, under its former and entirely different management, had been found guilty of unfair labor practices in refusing to bargain collectively with the union known as Local Union No. 492 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and in unilaterally instituting wage increases and employment benefits on September 5, 1957. This decision and order was upheld by the judgment of this Court entered on January 18, 1960. Ever since the rendition of said judgment Respondent has fully complied therewith, and, as admitted and averred in Paragraph III, 1, of said Petition, Respondent has been engaged in collective bargaining negotiations with said union. As averred in Paragraph III, 2, of the petition, it was in the course of such negotiations that Respondent caused the letter of August 2, 1960, to be addressed to said union. This was done in a good faith effort to effect an agreement on general wage increases and to inform the union what Respondent was willing to do in regard thereto.

The union never answered said letter, never agreed or objected to the proposed wage increases set out therein, and never made any counter proposals in respect thereto.

Beginning about June, 1960, there had developed a great amount of business activity in the Roswell area, due to the fact that the United States Government had contracted for the construction of twelve missile launching bases at a reported cost in excess of twenty two million dollars ($22,000,000). This projected outlay naturally caused wages in this area sharply to rise, particularly among construction workers, truck drivers, machinery and equipment operators, and employees of the type generally used by F. M. Reeves And Sons, Inc., at said plant. From the time the present owners acquired the Roswell plant in December, 1958, on up to August, 1960, there had been no general increase in wages at said plant.

During the summer of 1960, Respondent was awarded a contract for supplying all of the ready-mixed concrete for the construction of said twelve defense missile launching bases, which involved delivering to the various sites a total of about 86,000 cubic yards of material, at a cost of from $1,800,000 to $2,000,000. In view of the fact that these launching bases were to be constructed at widely separated points, some as much as twenty-five miles from Roswell, it became necessary for Respondent to hire a much larger labor force at said plant. In June, 1960, the total number of employees at the Roswell plant was about 39, of whom 19 were transit mix truck drivers. By the first week in August, the total number of such employees had risen to about 46, of whom 14 were transit mix truck drivers. By November, 1960, Respondent's said labor force had risen to 93, of whom 27 were transit mix truck drivers.

In order to properly handle its part of the work in constructing this important defense project within the limited time fixed by the Government contract, and because of the difficulty in obtaining and holding labor in the Roswell area, it was necessary, in the summer of 1960, for Respondent to arrange for the transfer of some seven transit mix truck drivers from its affiliated plants located in Odessa, Texas, and elsewhere. The transfer of these employees was accomplished in the latter part of July, 1960.

The men thus tranferred had been earning from $1.35 to $1.50 per hour. They agreed to pay all moving expenses for themselves and their families, and to work as transit mix truck drivers at the Roswell plant, in return for Respondent's agreement to pay them $1.85 per hour for such work.

When these men who were thus transferred began work at the Roswell plant, the transit mix truck drivers already employed at said plant were receiving only $1.70, $1.75 or $1.80 per hour. Most of these men were earning $1.70 per hour, and none had ever received a wage increase. These men had proven their worth by long and faithful service to the company, and as stated, it was necessary that their wages should be raised to $1.85 per hour to maintain equality with the wages being paid pursuant to prior agreement to the transferee workers. Such raises amounted to five cents to fifteen cents per hour, as hereinbefore shown.

Three men theretofore employed by Respondent at its Roswell plant were at about this time promoted and made foremen. These men had been receiving $1.85 per hour. Their established wages as foremen were $1.90 per hour. Such higher rate of pay was in no sense a wage increase for these men, but was compensation fixed for the jobs to which they had been promoted.

No transit mix truck driver in the employ of Re-

spondent has received, or is receiving, more than $1.85 per hour, nor have any wage increases been given by the present management to any employees at Roswell except to the transit mix truck drivers for the reasons and in the circumstances herein explained, and except for three unskilled laborers who had long and faithfully served in the employ of Respondent and whose wages, out of dire necessity resulting from the rise in the cost of living, were raised from $1.25 to $1.35 per hour. This was an equitable adjustment long overdue.

As shown in its letter of August 2, 1960, Respondent stated to the union its willingness to make general wage increases to all its employees at the Roswell plant, which increases it had every reason to believe were due and would be gladly received by the union's membership. As heretofore stated, the union never replied to this letter, never agreed or objected to the proposed general wage increases expressly set out therein and never made any counter proposals in respect thereto. After waiting until August 9, 1960, without having received any answer to its said letter of August 2, 1960, or any counter proposal on the subject of wages, Respondent reasonably assumed and understood that the union negotiators were still unwilling to make any agreement on general wage increases. Accordingly, Respondent in perfect good faith, put into effect the necessary and limited wage increases for its transit mix truck drivers and three laborers, as hereinbefore set out. While such limited wage increases were instituted on August 9, 1960, they were made effective as of August 1, 1960, for the reason that payroll checks were in the process of being prepared on August 9 for the work week which had already begun on August 1.

On or about August 2, 1960, the union asked Respondent's counsel at McAllen, Texas, for further negotiating

meetings in Roswell, New Mexico, on August 10-11-13, 1960. Since it was impossible for Respondent's counsel to come to Roswell on the dates mentioned, the meetings were by agreement postponed, and were held in Roswell on August 16-17, 1960. At said meetings, Respondent through its counsel, fully explained to the union representatives present what had been done in respect to the limited wage increases hereinbefore set out, and further explained the reasons and necessity therefor, all as hereinabove set out. There was not the slightest objection or question raised at said meetings by the union representatives concerning what had been done, and Respondent reasonably assumed and understood that said action was concurred in by the union, inasmuch as the parties had been and continued wholly unable to agree on general wage increases, and the union was steadfastly refusing to agree to such general wage increases unless Respondent should accede to its other demands, which Respondent was unable to meet. It was not until receipt, on or about September 10, 1960, of a copy of the Charge filed against it which led to the institution of this proceeding, that Respondent learned for the first time that the union was objecting to the limited wage increases hereinbefore described.

As clearly appears from the foregoing facts, the limited wage increases given by Respondent to a small group of its workers was not and could not with any degree of fairness or reasonableness be deemed an effort in any way to interfere with, restrain or coerce its employees. Nor can it truthfully be said that this Respondent, under its present management since December 12, 1958, has at any time refused to bargain collectively with the union.

On the contrary, the one and only ground of complaint set out in the petition is shown to be and was a

step taken by Respondent for perfectly legitimate reasons in its honest effort to maintain a labor force to enable it to perform a large contract important to the National Defense and wherein time is of the essence. No thought of union antagonism motivated Respondent in its efforts to handle this difficult situation. Even the increased wages now being paid to the small group of Respondent's employees, as hereinbefore shown, is much below wages being paid by competitors to the same type of employees in the Roswell area, particularly by the general contractor who holds the over all contract for the construction of these defense missile launching bases. Because of this fact, there has developed a large turnover in employment in the Roswell area, and Respondent has experienced much difficulty in maintaining its labor force, due to increased wages offered by competitors. In actual numbers, 63 employees have quit working for Respondent at its Roswell plant since January 1,1960, and have taken jobs elsewhere. It was and is imperative that an adequate labor force be maintained for Respondent to insure the proper and prompt delivery of concrete for the enormous construction work here involved. Without a continuous and adequate supply of such material all other work on the project is brought to a standstill. It was in pursuit of the lawful and laudable purpose of meeting such a situation that said limited wage increase was given in good faith, and without any thought or intent of inducing any employee to refrain from joining the union or from giving it their support.

As further evidence of the reasonableness and fairness of said limited wage increases made by Respondent for which contempt proceedings are now being prosecuted against it herein, Respondent would further show to the Court that it has received from Petitioner's

Assistant General Counsel a letter dated November 10, 1960, which states in part as follows:

> "As you will note from the prayer contained in our petition, it is not our intention to ask for a recission of the wage increases that have already been put into effect."

In plain words, Petitioner wants maintained the wage increases that Respondent set up, but at the same time Petitioner wants Respondent penalized and punished for putting them into effect. In the fact of such recognition and ratification by Petitioner of said wage increases, Petitioner has no standing to complain thereof, and should be repelled from this Court.

For all of the foregoing reasons, Respondent says that it has not violated, disobeyed or refused to comply with the decree of this Honorable Court, and is not in contempt thereof.

WHEREFORE, Respondent prays that this petition be dismissed with prejudice.

F. M. REEVES AND SONS, INC.,
By SCOTT TOOTHAKER.

Scott Toothaker,
1630 North Tenth Street,
McAllen, Texas.

THE STATE OF TEXAS,
County of Hidalgo, ss:

SCOTT TOOTHAKER, being first duly sworn, deposes and says that he is the Attorney for F. M. Reeves and Sons, Inc., a corporation; that he is duly authorized to execute and file the foregoing answer; that he has read said answer and knows the contents thereof, and

that the statements therein made upon personal knowledge are true, and those made on information and belief he believes to be true.

SCOTT TOOTHAKER.

Sworn to and Subscribed before me this 16th day of December, 1960.

VIDA C. OVERSTREET,
Notary Public In and For
Hidalgo County, Texas.

My Commission expires —— —, —.

CERTIFICATE OF SERVICE

A copy of the Respondent's Answer to Petition for Adjudication in Civil Contempt in the above cause was this day served by first-class mail upon the counsel listed below:

Marcel Mallet-Prevost,
Assistant General Counsel,
National Labor Relations Board,
Washington, D. C.

SCOTT TOOTHAKER.

Dated at McAllen, Texas, this 16th day of December, 1960.

3. *Motion to Amend Contempt Petition*

COPY OF TELEGRAM

MARCEL MALLET-PREVOST
National Labor Relations Board
Division of Litigation
Appellate Court Branch
December 21, 1960

United States Court of Appeals
for the Tenth Circuit,
Denver, Colorado

Re: No. 6125—*N.L.R.B.* v. *F. M. Reeves, Inc.*

The Board hereby respectfully requests permission to amend its petition for adjudication in civil contempt by adding the following allegation as paragraph III A. "Respondent is further violating the good faith bargaining obligation imposed by this Court's decree and Section 8(a) (5) of the National Labor Relations Act by insisting in the course of negotiations that the Union secure performance of its obligations under any contract entered into by providing $25,000 performance bond or an equivalent thereof." The Board consents to an extension of time to and including December 28, 1960, for respondent to answer this allegation. Copy of this telegram sent to respondent and its counsel.

MARCEL MALLET-PREVOST,
Assistant General Counsel,
National Labor Relations Board.

4. *Answer to Motion to Amend Contempt Petition*

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 6125

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

F. M. REEVES AND SONS, INC., RESPONDENT

RESPONDENT'S ANSWER TO PETITIONER'S MOTION FOR LEAVE TO AMEND

Respondent, F. M. Reeves and Sons, Inc., for answer to Petitioner's motion to amend its petition in the manner set out in its telegram addressed to the Court under date of December 21, 1960, says that said motion should be disallowed for the following reasons, to-wit:

1. The decree Respondent is charged with violating contains no prohibition against Respondent's calling on the Union to give bond as security for performance of its contract obligations, and hence, even if such demand was made, the same would be immaterial in this contempt proceeding.

2. The proposed amendment shows on its face that it is being offered in support of the charge of Respondent's bad faith in bargaining. The petition, by paragraph II, 1, (a), already makes the charge that Respondent has refused to bargain in good faith, and this charge has been directly denied in Respondent's answer. At the hearing the heavy burden will rest on Petitioner to establish by clear and convincing proof Respondent's bad faith, the same to be shown by competent evidence and by witnesses subject to cross-examination. *N. L. R. B.* v. *Standard Trouser Co.*, 162 F. 2d 1012, 1014 (C.C.A. 4th, 1947). *N. L. R. B.* v. *Little Rock Furniture Co.*, 123 F. 2d 868 (C.C.A. 8th.

1941), *N. L. R. B.* v. *Cleveland Trust Co.*, 214 F. 2d 95, 99 (C.A. 6th, 1954—citing numerous cases). What Petitioner is now seeking to do by this amendment is to inject into the pleadings purely evidentiary matter to bolster its charge of Respondent's alleged refusal to bargain in good faith, which charge is already at issue. This is not the proper time or manner for bringing before the Court evidentiary matter on that issue. All competent evidence may be offered at the hearing, under the pleadings already filed.

3. In substance and in effect Petitioner is seeking to call for an admission with respect to a specific fact, without complying with Rule 36 (a), F. R. C. P. under which procedure the immateriality of the alleged fact can be raised by objection.

For all of the foregoing reasons, it is respectfully submitted, the motion to amend should be disallowed.

SCOTT TOOTHAKER,
Attorney for Respondent.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing answer was this day served by first class mail upon Counsel for Petitioner at the address listed below:

Marcel Mallet-Prevost, Esquire,
Assistant General Counsel,
National Labor Relations Board,
Washington, D. C.

SCOTT TOOTHAKER,
1630 North Tenth Street,
McAllen, Texas,
Attorney for Respondent.

DATED at McAllen, Texas, this 27th day of December, 1960.

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